SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-897

HARRY B. STONER and STONER INVESTMENTS, INC., a Delaware Corporation,

Petitioners,

vs.

THE VENDO COMPANY, a Missouri Corporation,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

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INTRODUCTION

Petitioners have urged this Court to consider constitutional issues raised as an afterthought subsequent to a unanimous opinion of the Illinois Supreme Court written by Justice Walter V. Schaefer.

We propose to demonstrate in this Brief:

(1) That Petitioners have failed to meet the jurisdictional requirements necessary to a grant of this Petition;

(2) That the decision of the Illinois Supreme Court is well-considered, thorough and amply supported by the Record.

STATUTE INVOLVED

110 A Ill. Stat. Ann. §367

"Rehearing In Reviewing Court

"(a) *Time; Length.* A petition for rehearing may be filed within 21 days after the filing of the opinion, unless on motion the time is shortened or enlarged by the court or a judge thereof. Motions to extend the time for petitioning for rehearing are not favored. Unless authorized by the court of a judge thereof, the petition shall not exceed 20 pages if printed or 27 pages if not printed.

"(b) *Contents.* The petition shall state briefly the points claimed to have been overlooked or misapprehended by the court with proper reference to the particular portion of the record and brief relied upon, and with authorities and argument, concisely stated in support of the points. Reargument of the case shall not be made in the petition."

STATEMENT OF THE CASE

Respondent prefers to present the relevant facts according to the issues raised by Petitioners, thusly:

I. The Pleadings And Proof Of Breach Of Fiduciary Duty.

The original complaint was filed August 10, 1965, which alleged, among other things, that Petitioner, Stoner, executed an employment contract with Vendo and that he "breached his duties and obligations thereunder. . . ." (Vol. I, A. 4).

In his First Counterclaim Stoner admitted that he was an employee of Vendo from 1959 to 1964 "and nominally the president of the Stoner Mfg. Co. division." (Vol. I, A. 6)

After some discovery, Count I of the Complaint was amended in part to further allege "that [Stoner] during the term of his employment, and thereafter, through the provision of financing, advice and use of facilities, entered into the vending machine manufacturing business with Lektro-Vend" (Vol. I, A. 44).

On December 16, 1966, the trial judge delivered his opinion upon the conclusion of the first trial. He made specific reference to Stoner's fiduciary duties and obligations, exploring "whether or not the conduct of the individual defendant is consistent with his obligations as a director." (Vol. I, A. 485)

In arguing the Motion to Vacate on May 12, 1967, Stoner's attorney made repeated references to the evidence of fiduciary duty, including an acknowledgment that "I know we somehow got involved in the fiduciary duties of a director generally." (Vol. I, A. 496. See also A. 497, 500, 508, 511).

He specifically acknowledged that the $250,000.00 judgment against Stoner was based on the fact that Stoner was found to be a "faithless director." (Vol. I, A. 500)

In his brief on the first appeal Stoner argued that "Stoner's Employment Contract Alone Determined The Scope Of His Fiduciary Duties. Vendo Is Bound By Its Terms." (Docket No. 68-1, Appeal to the Appellate Court of Illinois, Second District, Appellant's Brief, p. 80).

The Appellate Court, Second District, held following the first trial:

> "At the outset, we agree that such a breach of Stoner's fiduciary undertaking as an employee in the instant case requires a forfeiture of salary during the period that the breach was occurring."
> (Pet. App. B 288)

Following the second trial, and during the appeal to the Illinois Supreme Court, Petitioner argued in its brief that "Vendo Changed The Theory Of Its Case Upon Remand, Contrary To The Law Of The Case As Announced In The First Appeal. The Judgment Was Outside The Issues Framed By The Pleadings." (Docket Nos. 46228, 46231 Consolidated In The Supreme Court Of Illinois, Appellee's Brief, p. 53). As Petitioners have admitted here, they *did not argue to the Illinois Supreme Court that a possible violation of due process was at issue.*

The Illinois Supreme Court addressed that issue:

> "Defendants also urge that the plaintiff has impermissibly changed the theory of its case from that on which it relied in the first trial. We think that defendants' contention represents an artificial analysis. In some situations there could be, of course, a violation of a covenant not to compete without the breach of a fiduciary duty, as would be the case if Stoner had not been an officer and director of plaintiff. In the present case, however, the acts of defendants in misappropriating the Lektro-Vend and their use of it to compete

against plaintiff are intertwined, the latter being, so to speak, the means by which the former was brought to bear against plaintiff.

"We are not confronted here with the situation in which a litigant attempts to interject on appeal a theory never advanced in the trial court. Plaintiff made its theory quite explicit in the trial on remand. It is a familiar principle, moreover, that when an appeal is taken the appellee may defend the judgment below on any ground appearing of record . . . We fail to see how defendants have suffered any prejudice from any supposed change in the theory on which plaintiff has presented its case."

(Pet. App. F 306-7)

Additionally the Supreme Court granted Vendo's motion to amend the pleadings to conform to the proof (Pet. App. F 307). Petitioners do not question here the power of the Illinois Supreme Court to grant such a motion.

II. The Illinois Anti-Trust Defense And Counterclaim.

Petitioners raised in their Fifth Separate Defense that the non-competition covenants contained in the 1959 contracts with Vendo were unlawful under the 1965 amendment to the Illinois Antitrust Act (Vol. I, A. 13).

In their First Counterclaim (Vol. I, A. 15-19) once amended (Vol. I, A. 39-40) Petitioners sought a permanent injunction and damages based upon alleged violations of the 1965 Illinois Antitrust Act by reason of the 1959 covenants and Vendo's efforts to enforce them.

The trial court ruled, and the Appellate Court agreed on the first appeal, that these pleadings ought to be stricken (Pet. App. B 294). The Appellate Court said the following with respect to those pleadings:

"By way of affirmative defense, it was alleged that the contracts sued upon violated the Illinois and Fed-

eral antitrust laws and were therefore invalid and unenforceable. Defendants also counterclaimed under the Illinois antitrust laws for treble damages . . . The 1965 Illinois antitrust law was held inapplicable for the additional reason that it had not been enacted until after execution of the agreements sued upon."

(Pet. App. B 294)

During the second trial Petitioners sought to reinstate their Illinois antitrust defenses and counterclaims, which was denied by the trial court and affirmed upon the second appeal by the Illinois Appellate Court, Second District, saying:

"In our opinion we affirmed the trial court's striking of these affirmative defenses and counterclaim bounded [sic] on alleged violation of Illinois antitrust laws. (*Vendo Co.* v. *Stoner*, 105 Ill. App. 2d at 298-299.) Subsequent to this court's prior opinion the Illinois legislature enacted section 7.9 amending the Illinois Antitrust Act, effective July 1, 1969 (Ill. Rev. Stat. 1969, ch. 38, sec. 60—7.9) to provide as follows:

'No action under this Act shall be barred on the grounds that the activities or conduct complained of in any way affects or involves interstate or foreign commerce.'

The Attorney General of Illinois, as *amicus curiae*, supports plaintiff's argument on this point.

"Even if it be assumed that the State legislature had the authority to enact this amendatory provision, we are unable to ascribe to it retroactive application to contracts entered into five years earlier. Our affirmance in the prior opinion of the trial court's dismissal of the State antitrust defense and counterclaim became the law of the case on remand. The trial court properly refused to allow reinstatement of the defense and counterclaim based on the amendment of the Illinois Antitrust Act."

(Pet. App. E 295)

These references to the facts of the Illinois antitrust defense and counterclaim were the only ones to appear in the Appellate Court opinions. Before the Illinois Supreme Court Petitioners implicitly accepted these facts when they affirmed that "the facts stated in the two opinions of the Appellate Court are substantially correct" (App. Br. 23. Docket No. 46228 in the Supreme Court of Illinois).

The Illinois Supreme Court addressed the same issue as follows:

> "At the original trial defendants raised as an affirmative defense and by way of counterclaim a charge that the sale agreement and the employment contract violated both the Illinois Antitrust Act . . . and the Federal antitrust laws. . . .
>
> "With respect to the State antitrust claim the appellate court on the first appeal affirmed the action of the trial court in striking the affirmative defense and counterclaim. On remand defendants unsuccessfully sought to reinstate their defense and counterclaim, and the appellate court again affirmed the judgment of the trial court in this respect. . . .
>
> "We prefer to dispose of this issue on another ground, namely that the Illinois act, having been enacted in 1965, long after the contracts here in question were entered into, cannot properly form the basis of a counterclaim by defendants."
>
> (Pet. App. F 309-310)

Petitioners' Federal antitrust defenses were voluntarily dismissed by them following the first trial.

ARGUMENT

I. By Petitioners' Own Admission The Alleged Constitutional Issues Have Neither Been Raised Properly Nor Decided By The Illinois Supreme Court.

Nine years of extensive litigation have seen this case before the Circuit Court of Kane County twice, the Illinois Appellate Court, Second District, twice and the Illinois Supreme Court once.

In the Illinois Supreme Court alone all briefs totaled more than 431 pages. Petitioners have been ably represented by experienced trial and appellate counsel. Yet Petitioners must admit on this record that these "serious" constitutional issues of due process of law were not raised in the State court until their Petition for Rehearing!

This belated appeal to the constitution comes too late. The general rule was framed in *Herndon* v. *Georgia*, 295 U.S. 441, 443, 79 L. Ed. 1530, 1532 (1935), to refuse consideration of issues brought forth for the first time on rehearing:

> "The federal question was never properly presented to the state supreme court unless upon motion for rehearing and that court then refused to consider it. The long-established general rule is that the attempt to raise a federal question after judgment, upon a petition for rehearing, comes too late, unless the court actually entertains the question and decides it."

A petition for writ was recently dismissed in *Cardinale* v. *Louisiana*, 394 U.S. 437, 22 L. Ed. 2d 398 (1969), for the reason that the questions were neither raised *nor* decided below.

Petitioners admit that *all* their federal issues were raised for the first time on Petition for Rehearing (Pet. 11). That

Petition was denied (Pet. App. H 1) without the Illinois Supreme Court deciding any of those questions. Petitioners well know that the Court would *not* decide them either, since the Illinois Supreme Court Rules limit the petition to those points "overlooked or misapprehended by the court." (110 A Ill. Stat. Ann. §367).

Petitioners rely on a narrow exception to the general rule utilized in *Saunders* v. *Shaw*, 244 U.S. 317, 61 L. Ed. 1163 (1917), that when the action of the state court could not have been *anticipated* by the aggrieved party, a Petition for Writ will lie. But this exception cannot apply here. The only thing that Petitioners did not anticipate was that they would lose the case in the Illinois Supreme Court. Each and every factual and legal issue raised by this Petition has been part of this case since its very inception:

(1) The breach of fiduciary duty

As early as the first trial Petitioners' attorneys acknowledged that fiduciary duties were involved. The Illinois Supreme Court correctly characterized Petitioners' insistence that the theory had changed as an "artificial analysis." (Pet. App. F 306)

(2) The measure of damages

Ever since the first Appellate Court opinion the parties have been arguing the theory of damages. That Court held that Vendo would be entitled to "the measure of lost profits to Vendo during the period of the breach, plus the diminution of its business at the end of the period covered by the covenants." (Pet. App. B 290). These were precisely the damages proved by Vendo and approved by the Illinois Supreme Court.

(3) The Illinois Antitrust Defenses and Counterclaim

The trial judge ruled in the very first trial that the 1965 Illinois Antitrust Act would not be retroactively

applied to the 1959 covenants. (Pet. App. B 294). This is exactly the ground upon which the Illinois Supreme Court ultimately affirmed that ruling (Pet. App. F 309-310).

Petitioners *never* emphasized their factual contention that the Counterclaim referred to post-1965 conduct (a contention we nevertheless dispute) but rather assured the Illinois Supreme Court that the facts contained in the Appellate Court opinions were "substantially correct." Neither of those opinions made reference to such conduct. The Illinois Supreme Court had a right to rely on those assurances.

The tactics and strategy of Petitioners are painfully apparent. They chose to rely on *State law* to argue *State issues* before the *State Court*. Since they failed to convince the State Court, they now for the first time elevate these State issues to constitutional proportions in order to retry this case yet another time.

These efforts are neither within the letter nor the spirit of the principles governing Petitions for Writs of Certiorari, and this Petition ought to be dismissed.

II. The Decision Of The Illinois Supreme Court Rests Upon Adequate Independent State Grounds.

Yet again by Petitioners' own admission, the Illinois Supreme Court did not decide any federal questions. Each and every ground upon which the decision is based is traditional and highly orthodox state law:

(1) cause of action for damages as a result of the breach of fiduciary duties by a corporate officer and director;

(2) damages measured by the extent of the provable loss;

(3) refusal to give retroactive effect to criminal statutes in the absence of a clear legislative mandate.

This Court recognizes that the existence of independent adequate state grounds in the opinion is sufficient reason to decline review. *Henry* v. *Mississippi*, 379 U.S. 443, 13 L. Ed. 2d 408 (1965).

For instance, Petitioners' Counterclaim was disposed of on the basis that the 1965 Illinois Antitrust Act would not be retroactively applied to invalidate 1959 contracts (Pet. App. F 310). On Petition for Rehearing Petitioners *misrepresented the Record* to the Illinois Supreme Court when they stated: "The Court does not consider the prospective operation of the law and *the validity of a counterclaim thereunder which sought damages for acts of the plaintiffs only from 1965 on. . . .*" (Pet. App. G 14).

No such limitations were contained in the pleadings. Petitioners alleged in paragraph 7 of their First Counterclaim that the 1959 contracts were "in unreasonable restraint of trade and commerce" (Vol. I, A. 18); paragraph 7 A alleged duress by Vendo in making "illegal demands" during the contract negotiations (Vol. I, A. 39); in their prayer for relief Petitioners requested the Court to decree "that the acts of Vendo as hereinabove described *have been and continue to be in violation of Section 3 of the Illinois Antitrust Act of 1965*" (Vol. I, A. 40). Petitioners then seek to cast their argument to this Court in terms of a Counterclaim dealing only with conduct "*after* the effective date of the 1965 Act." (Pet. 21).

Petitioners are thus forced to modify the Record in fairy tale fashion—what *might have been*—in order to persuade this Court that the Illinois Supreme Court acted arbitrarily in rendering its decision.

III. The Record In This Case Overwhelmingly Supports The Affirmance Of This Money Judgment By The Illinois Supreme Court.

The Abstract in this case alone is 1,225 pages in length. From the time of the first decision of the trial court award-

ing damages to the plaintiff, through both appeals to the Appellate Court and finally in the Illinois Supreme Court, it has been concluded after careful scrutiny of the Record that Vendo was entitled to an award of damages against Petitioners. The *only* issue upon which the Courts did not agree was that of the proper measure of damages.

Even if it *is* the province of this Court on certiorari to determine whether the State judgment is supported by the evidence (which we deny), we invite the Court to read the opinion of the Illinois Supreme Court (Pet. App. F), where that Court concluded:

> (1) "it is clear that Stoner violated his fiduciary duties to plaintiff" (Pet. App. F 303):
>
> (2) "Plaintiff was not . . . limited to the recovery of the profits which accrued to Lektro-Vend" (Pet. App. F 305):
>
> (3) "The limitation on a plaintiff's recovery proposed by defendants would mean that a fiduciary could violate his duty without incurring any risk" (Pet. App. F 305).

We nevertheless deny that this Court assumes the burden of reviewing all Records of money judgments for common law actions to determine whether findings are supported therein. *Schware* v. *Board of Bar Examiners*, 353 U.S. 232 (1957), and *Konigsberg* v. *State Bar of California*, 353 U.S. 252 (1957), do not so hold. These cases involved the conduct of hearings to determine whether applicants to practice law were unconstitutionally denied their right to enter the legal profession. There is *no* requirement, on the other hand, for the United States Supreme Court to review the Record of a State Court proceeding to recover damages for wrongful conduct which is affirmed *entirely upon State grounds.*

If this Court were to countenance such principles for review the workload would swell to unmanageable proportions.

CONCLUSION

Throughout this entire litigation the Petitioners have been content to rest their case on what they conceived to be the applicable Illinois State law. They were wrong. The Illinois Supreme Court, in a carefully written and exhaustive opinion, dealt with and disposed of Petitioners' contentions as they were presented.

Petitioners now take these same contentions and urge this Court to find that due process issues are involved in the manner in which the State Court decided them. Due process does not entitle Petitioners to win. It entitles them to a full and fair hearing. The State Court provided such a hearing, on Petitioners' own terms. They cannot now complain. Respondent respectfully urges this Court to:

(1) Dismiss the Petition for lack of jurisdiction; or in the alternative

(2) Deny the Petition.

Respectfully submitted,

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